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Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ARTHUR L. MORGAN, Corporal,
United States Marine Corps,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a 4 year old child's statement, made *after* a motive to deceive arose, is admissible under Military Rule of Evidence 801(d)(1)(B), which excludes certain prior consistent statements from the general rule against hearsay?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
RULES OF EVIDENCE INVOLVED	2
STATEMENT OF THE CASE	3
REASON FOR GRANTING THE WRIT	4
THE COURT SHOULD GRANT THIS WRIT TO RESOLVE AN IMPORTANT CONFLICT BETWEEN THE COURTS OF APPEAL AND THE U.S. COURT OF MILITARY APPEALS REGARDING THE ADMISSION OF PRIOR CONSISTENT STATEMENTS	4
CONCLUSION	7
APPENDIX A	
Opinion of the U.S. Court of Military Appeals	1a
APPENDIX B	
Opinion of the U.S. Navy-Marine Corps Court of Military Review	11a

TABLE OF AUTHORITIES

Cases:

United States v. Anderson, 782 F.2d 908 (11th Cir. 1986)	5
United States v. Bowman, 798 F.2d 333 (8th Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987)	5
United States v. Brennan, 798 F.2d 581 (2d Cir. 1986), *cert. denied*, 109 S. Ct. 1750 (1989)	5
United States v. DePeri, 778 F.2d 963 (3d Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986)	5
United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983)	5

TABLE OF AUTHORITIES—Continued

	Page
United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984)	5
United States v. Monzon, 869 F.2d 338 (7th Cir. 1989), *cert. denied*, 109 S. Ct. 2087 (1989)	5
United States v. McCaskey, 30 M.J. 188 (C.M.A. 1990)	5
United States v. Parry, 649 F.2d 292 (5th Cir. 1981)	5
United States v. Rios, 611 F.2d 1335 (10th Cir. 1979)	5
United States v. Smith, 893 F.2d 1573 (9th Cir. 1990)	5
United States v. Vest, 842 F.2d 1319 (1st Cir. 1988), *cert. denied*, 488 U.S. 965 (1988)	5
Statutes:	
10 U.S.C. § 832	3
10 U.S.C. § 925	2, 3
10 U.S.C. § 934	2, 3
28 U.S.C. § 1259(3)	2
Rules of Evidence:	
Federal Rule of Evidence 801(d)(1)(B)	2
Military Rule of Evidence 801(d)(1)(B)	2, 4

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Arthur L. Morgan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 7, 1990.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Morgan*, 31 M.J. 43 (C.M.A. 1990), is reprinted as Appendix A.

The opinion of the United States Navy Marine Corps of Military Review, *United States v. Morgan*, No. 88-3838 (N.M.C.M.R. July 26, 1989), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps

Court of Military Review on September 7, 1990. 28 U.S.C. § 1529(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision affirming his conviction.

STATUTES INVOLVED

10 U.S.C. § 925, Article 125, Uniform Code of Military Justice. Sodomy.

> (b) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.
>
> (b) Any person found guilty of sodomy shall be punished as a court-marital may direct.

10 U.S.C. § 934, Article 134, Uniform Code of Military Justice. General article.

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which such persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-marital, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

RULES OF EVIDENCE INVOLVED

Federal Rule of Evidence 801(d)(1)(B)[1]

> A statement is not hearsay if:

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[1] Military Rule of Evidence 801(d)(1)(B) is taken verbatim from the Federal Rules of Evidence, except that the earlier consistent statement need not have been made under oath, or at any type of proceeding. Drafter's Analysis, Manual for Courts-Martial, United States, 1984, at A22-47 (Change 2).

> . . . the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

STATEMENT OF THE CASE

Contrary to his pleas, petitioner was convicted by officer and enlisted members[2] at a general court-martial for committing forcible sodomy upon a female under the age of 16 and for communicating indecent language to a female under the age of 16.[3] Petitioner was sentenced to confinement for ten years, forfeiture of all pay and allowances, reduction to paygrade E-1, and a dishonorable discharge.

The charges arose from an alleged sexual assault by petitioner upon a four year old girl who lived next door to him in military housing. During cross-examination of the child witness, defense counsel sought to impeach her by pointing out alleged inconsistencies in her statements and by having her acknowledge she had told the same "story over and over again". Record at 196-199.

In response to this cross-examination, trial counsel, during the government's case-in-chief, offered a videotaped interview of the child conducted by a social worker. Record at 277. This interview occurred after the alleged incident was brought to the authorities' attention, but prior to the Article 32 hearing.[4] The defense counsel objected to this videotape, stating that the motive to fabricate had arisen prior to the original complaint, and, therefore, the tape did not rebut the allegation of coaching. Record at 281-282. The military judge overruled

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[2] A military accused may elect to be tried before a judge or a panel composed of officers and enlisted members selected by his commanding officer.

[3] 10 U.S.C. §§ 925, and 934 (1982 and Supp. 1984).

[4] The government conducts an Article 32, U.C.M.J. pretrial hearing to determine whether there is sufficient evidence to refer the charges to a general court-martial. 10 U.S.C. § 832 (1982).

the defense objection and allowed the videotape to be played for the members, instructing them they could consider it for its "tendency to refute [the] suggestion of recent fabrication, improper influence, or improper motive" and "for the truth of the matters stated within". Record at 488.

Defense counsel argued to the members that the alleged victim's mother had coached the child to fabricate the story in an effort to bring her deployed Marine husband home. Record at 472. Defense counsel stated that the alleged victim's testimony revealed such coaching. Record at 471-473.

The Navy-Marine Corps Court of Military Review affirmed petitioner's sentence in an unpublished decision. *United States v. Morgan*, No. 88-3838, slip op. (N.M.C.M.R. July 26, 1989). The Court of Military Appeals granted review on two issues.[5] The Court of Military Appeals affirmed the lower Court's decision. *United States v. Morgan*, 31 M.J. 43 (C.M.A. 1990).

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THIS WRIT TO RESOLVE AN IMPORTANT CONFLICT BETWEEN THE COURTS OF APPEAL AND THE U.S. COURT OF MILITARY APPEALS REGARDING THE ADMISSION OF PRIOR CONSISTENT STATEMENTS.

Military Rule of Evidence 801(d)(1)(B) duplicates the Federal rule, making admissible statements consistent with the in-court testimony of a witness and "offered to rebut an express or implied charge against the de-

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[5] Whether the military judge erred by admitting a videotape recording of statements made by the alleged victim to a social worker, and whether the record demonstrated the child witness' inability to distinguish truth from falsity and to understand the moral importance of telling the truth. Petitioner maintains that the Court of Military Appeals erred in ruling that Mil. R. Evid. 801(d)(1)(B) permits the videotaped statement's admission as a "prior consistent statement."

clarant of recent fabrication or improper influence or motive". The Court of Military Appeals has ruled that prior consistent statements must precede the motive to fabricate. *United States v. McCaskey*, 30 M.J. 188 (C.M.A. 1990). In this case, however, the Court of Military Appeals failed to follow its own precedent. Similarly, the circuit courts of appeals are split on the admissibility of such a prior statement, made after a motive to fabricate arises. Six circuit courts of appeals have interpreted the Rule with a requirement that the statement precede the motive to fabricate.[6] Four circuits would allow the statement irrespective of its timing,[7] and three circuits have not expressed an opinion.[8]

Logically, courts should admit and consider prior consistent statements only if they were made *prior* to the motive to fabricate, because lies often repeated do not gradually evolve into the truth. Rule of Evidence 801 (d)(1)(B) allows only statements offered to *rebut* a charge of prior influence or fabrication. A statement made while the declarant is subject to improper influence, or worse, made *after* the declarant has decided to fabricate, rebuts nothing.

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[6] *See United States v. Vest*, 842 F.2d 1319 (1st Cir. 1988), *cert. denied*, 488 U.S. 965 (1988); *United States v. Brennan*, 798 F.2d 581 (2d Cir. 1986), *cert. denied*, 109 S. Ct. 1750 (1989); *United States v. Henderson*, 717 F.2d 135 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984); *United States v. Monzon*, 869 F.2d 338 (7th Cir. 1989), *cert. denied*, 109 S. Ct. 2087 (1989); *United States v. Bowman*, 798 F.2d 333, 338 (8th Cir. 1987), *cert. denied*, 479 U.S. 1043 (1986); *United States v. Smith*, 893 F.2d 1573 (9th Cir. 1990).

[7] *United States v. Parry*, 649 F.2d 292 (5th Cir. 1981); *United States v. Hamilton*, 689 F.2d 1262 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983); *United States v. Rios*, 611 F.2d 1335 (10th Cir. 1979); *United States v. Anderson*, 782 F.2d 908 (11th Cir. 1986).

[8] *United States v. DePeri*, 778 F.2d 963, 977 (3d Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986). The District of Columbia and Federal Circuit Courts of Appeals have not resolved this issue.

In this case, the Court of Military Appeals acknowledged the rule it adopted in *McCaskey*, but found that the military judge did not err by admitting the statement. The Court noted that since the defense counsel had attempted to impeach the child witness with her inconsistent testimony at the preliminary evidentiary (Article 32, U.C.M.J.) hearing, and had emphasized the fact she had repeated her story several times, the defense counsel had "raised the spectre that improper influence had occurred after the Article 32 hearing." *Morgan*, 31 M.J. at 46. The Court apparently reasoned that this implied accusation of additional influence permitted the prosecutor to offer the videotaped statement, which was prepared after the authorities had been notified.

The Court's logic is based on the questionable premise that 'spectres' of influence existed separately in this case. This tortured reasoning demonstrates result-oriented decisionmaking, since the most logical application of the holding in *McCaskey* would require that the videotape be barred, as it was prepared *after* the motive to fabricate arose. Thus, the result pays lip service to the majority rule, with exceptions created whenever needed to assist the prosecution, and providing no clear guidance to practitioners involved with this frequently occurring issue.

The engine behind the improper influence in this case, as defense counsel indicated, was the alleged victim's mother. Her coaching, he argued, began at the time of the complaint, and *continued on throughout the trial.* Defense counsel's cross-examination of the child served to highlight petitioner's belief that she had been coached, not only in preparation for that hearing, but continuously from the moment Mrs. Midkiff decided to bring her husband home. Admission of this statement, an interview between the alleged victim and a social worker, presented via the powerful medium of videotape and admitted both for its rehabilitative value and *for the truth of the matter stated therein*, improperly sealed petitioner's conviction in this instance.

CONCLUSION

This case allows this Court the opportunity to establish a clear standard regarding the admissibility of prior consistent statements, and this Court should grant the petition to correct the confusion created by the Court of Military Appeals' conflicting opinions. Moreover, this Court should grant the petition to ensure that emotionally charged and hotly contested child abuse cases do not result in illogical interpretation of the evidentiary rule governing prior consistent statements.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 63,193
NMCM 88 3838

UNITED STATES,

Appellee,

v.

ARTHUR L. MORGAN, Corporal,
U.S. Marine Corps,

Appellant.

Argued March 13, 1990

Decided Sept. 7, 1990

OPINION OF THE COURT

COX, Judge:

Appellant was tried by a general court-martial composed of officer and enlisted members at Camp Pendleton, California, in March 1988. Contrary to his pleas, he was convicted of forcible sodomy [1] on, and communicating in-

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[1] The court-martial promulgating order, dated September 6, 1988, merely reflects that appellant committed sodomy on the victim (named but not otherwise described) on the date in question. This admits of the interpretation that the act may have been consensual and the victim an adult. While we are sympathetic with the desires of the services to minimize the administrative burdens of processing court-martial orders, *see* RCM 1114(c)(1), Manual for Courts-Martial, United States, 1984, we think the orders should at least indicate the true nature of the offenses.

decent language to, a female under the age of 16, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 USC §§ 925 and 934, respectively. Appellant was sentenced to confinement for 10 years, total forfeitures, reduction to E-1, and a dishonorable discharge. The convening authority approved the sentence, and the Court of Military Review affirmed in an unpublished opinion. We granted review of the following issues:

I

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING A VIDEOTAPE RECORDING OF STATEMENTS MADE BY THE ALLEGED VICTIM TO A SOCIAL WORKER.

II

WHETHER THE RECORD DEMONSTRATES THE FOUR-YEAR-OLD WITNESS' INABILITY TO DISTINGUISH TRUTH FROM FALSITY AND TO UNDERSTAND THE MORAL IMPORTANCE OF TELLING THE TRUTH.

The charges arose from an alleged sexual assault by appellant on a 4-year-old girl at Camp Pendleton. Appellant and his family lived next door to the victim and her family in base housing. On the evening of October 1, 1987, appellant invited the victim and her mother, Mrs. M, over to his house for dinner with him and his three children. Appellant's wife was working that night, so she was not home. Mrs. M's husband, a lance corporal, was overseas on military assignment. The two couples apparently had been good friends, and the children often played together.

During opening argument, defense counsel announced the theory that Mrs. M had coached her child to fabricate the incident so that her husband would be brought home. Counsel informed the members that the victim's trial testimony would reveal such coaching. On closing

argument, defense counsel reiterated this claim and also charged that the child's trial testimony was inconsistent with her Article 32, UCMJ, 10 USC § 832, testimony.

As the evidence on the merits revealed, at approximately 8:00 p.m. on the evening in question, Mrs. M was in appellant's kitchen talking on the phone. The victim was upstairs in the bathroom, and appellant was also upstairs. According to the child's testimony, appellant took her into his bedroom, got her on the bed, and took her clothes off. He then anally sodomized her ("He stuck his knobby in my butt"), and "he asked me to lick it and I said no." He warned her not to scream and threatened her if she told anyone. The child testified about her understanding of male and female genital areas, using anatomical dolls. At one point, however, she became confused, and it was necessary to call a recess.

During cross-examination, defense counsel sought to impeach her by pointing out alleged inconsistencies in her statements and by having her acknowledge that she had told the same "story over and over again."

Mrs. M testified that, upon returning home, she noticed her daughter was acting "kind of excited and kind of keyed up a little bit." When Mrs. M asked her why she was acting strangely, the victim replied that appellant had "stuck his knobby in her butt."[2] When Mrs. M asked her again, she began to cry. At that point, Mrs. M examined the child's anus and saw blood. She immediately took her to the Camp Pendleton Naval Hospital; the following morning, they went to the San Diego Children's Hospital.

Defense counsel attempted to impeach Mrs. M on cross-examination with allegedly inconsistent prior statements regarding the injury to the victim's anus. He also attempted to develop the theme that Mrs. M had invented the molestation story in order to get her husband home.

The treating physician from the Naval hospital testified that the child's anus had been damaged. A pedia-

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[2] This statement was admitted as an excited utterance.

trician from the children's hospital concurred that the anal area had been significantly damaged.[3]

In light of the cross-examination of the victim, as well as that of Mrs. M, trial counsel offered, as a prior consistent statement, a videotaped interview between the child and a social worker from the San Diego Center for Child Protection. Mil.R.Evid. 801(d)(1)(B), Manual for Courts-Martial, United States, 1984. The interview occurred after Mrs. M first brought the matter to the attention of the authorities, but before the Article 32 hearing. Defense counsel objected on the ground that the videotape would not rebut the charge of coaching, in that the alleged motive to fabricate had already arisen prior to the initial complaint. *See United States v. McCaskey*, 30 MJ 188 (CMA 1990). In addition, counsel argued that the evidence would be cumulative. *See* Mil.R.Evid. 403.

Observing, *inter alia*, "that there are no time parameters in [Mil.R.Evid.] 801(d)(1)(B)," *but see United States v. McCaskey, supra*, and that "the nature and thrust of the cross-examination of the little girl standing alone is sufficient to bring these rules into play," the military judge overruled the objection and permitted the videotape to be played for the court members. Ultimately, the judge instructed the members that they could consider the videotape interview for its "tendency to refute [the] suggestion of recent fabrication, improper influence, or improper motive" and for "the truth of the matters stated therein."

I

Before this Court, appellate defense counsel contend that the videotaped interview was inadmissible because appellant was not given the opportunity to cross-examine

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[3] In addition, a child psychologist, who treated the child, testified that the child exhibited symptoms characteristic of a child who had been sexually molested. Among other things, she demonstrated sexual contact between a male doll and female doll and told the psychologist appellant "was mean and that's what had happened."

the witness during the social worker's interview of the child. Therefore, in appellant's view, his right to confrontation under *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988), was denied. In *Coy*, the victims testified in court, but behind a screen, so that they could not see the accused. *Coy* is inapposite to this case because this victim faced appellant in court, eyeball to eyeball. *See California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) (right to confrontation not violated by admission of prior statement of witness who was subject to cross-examination at trial, but not subject to cross-examination at time of prior statement).

What is guaranteed is the "*opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 294, 88 L.E.2d 15 (1985); *see also United States v. Owens*, 484 U.S. 554, 558, 108 S.Ct. 838, 842, 98 L.Ed.2d 951 (1988); *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S.Ct. 2658, 2664, 96 L.Ed.2d 631 (1987). In this case, appellant had ample opportunity to cross-examine the witness. *Cf. United States v. Quick*, 26 MJ 460 (CMA 1988). The circumstances giving rise to the Supreme Court's concerns in *Coy* and other confrontation cases were simply not present here.

Appellant further contends that the videotaped interview was inadmissible under the Military Rules of Evidence. A prior, out-of-court statement, made by a person who testifies at trial, is admissible if it is "consistent with the declarant's testimony and is offered to rebut an *express or implied* charge against the declarant of *recent fabrication* or *improper influence* or motive." Mil.R. Evid. 801(d)(1)(B) (emphasis added). *See also* Fed. R.Evid. 801(d)(1)(B).[4] In a sense, admissibility of such

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[4] Mil.R.Evid. 801(d)(1)(B) is taken verbatim from the Fed.R. Evid. and

> makes admissible on the merits a statement consistent with the in-court testimony of the witness and "offered to rebut an

declarations is "a matter of choice by the party opposed to the witness," who "may 'open the door' to the use of such statements by engaging in a particular kind of impeachment, or leave the door shut by refraining." D. Louisell and C. Mueller, *Federal Evidence* § 420 at 187 (1980) (footnote omitted).

Although defense counsel contended he was implying only that the child had been coached from the beginning, he actually raised two separate theories through his cross-examination of mother and child and his argument. The first was that the girl had been coached to fabricate the incident, so as to accomplish the return of her father from an overseas assignment. The second was that her trial testimony did not even agree with that given at the Article 32 hearing.[5]

By seeking to impeach the victim with allegedly inconsistent Article 32 testimony, and by stressing that she had told her story "over and over again," counsel raised the spectre that improper influence had occurred after the Article 32 hearing. Indeed, arguably, the spectre continued through trial on the merits, because it became necessary at one point to call a recess for the girl, and she might have received further instruction then from her mother, who was with her in the courtroom.

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express or implied charge against the declarant of recent fabrication or improper influence or motive." Unlike Rule 801(d)(1)(A), the earlier consistent statement need not have been made under oath or at any type of proceeding. On its face, the Rule does not require that the consistent statement offered have been made prior to the time the improper influence or motive arose or prior to the alleged recent fabrication.

Drafter's Analysis, Manual for Courts-Martial, United States, 1984, at A22-47 (Change 2).

[5] Actually, the two theories appear to be contradictory. In the first one, counsel is effectively asserting that the child should not be believed because her testimony was too smooth and consistent. In the second, he suggests that she should not be believed because her testimony was so inconsistent.

In resolving this case, we adhere to the view expressed in *United States v. McCaskey, supra*, that Mil.R.Evid. 801(d)(1)(B) "generally was intended to be limited to prior consistent statements made before the alleged recent fabrication or improper influence or motive occurred." 30 MJ at 192 (footnote omitted). Here, defense counsel threw down the gauntlet at the outset and charged that the accusations were deliberately falsified from the beginning and that the Government's most damning witness was coached throughout. Additionally, however, defense counsel quite clearly charged fabrication since the testimony at the Article 32 hearing. Under these circumstances, we are satisfied, at a minimum, that the interview that occurred prior to the Article 32 hearing adequately rebutted the implication of the most recent fabrication and influence, and it was thus admissible.[6]

II

The second issue relates to the competence of the victim as a witness. Before the victim was allowed to testify, trial counsel administered the following "oath," in front of the court members:

> TC: I want you to stand right here, . . . and I want you to look at me, all right? Are you looking at me?
>
> WITNESS: Witness nodded her head in the affirmative.

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[6] Ironically, if coaching or improper influence occurred, the videotape of the interview should have been the defense's best evidence of it. The methods and approach of the social worker were totally different from those of counsel at trial; the members could readily assess how well the 4-year-old's story was holding together under the various techniques and after a 5-month hiatus. We assume trial counsel would not have been so eager to offer the videotape if it depicted the victim as being coached, *i.e.*, telling the same story over and over again, in the same order, with the same gestures, inflections, vocabulary, etc. Still, trial counsel ran the risk that this is what the members might have decided. We can think of few media more effective than videotape for allowing the members to answer this question in their own minds.

TC: Can you raise your right hand?

WITNESS: Witness raised her left hand.

TC: Raise your other hand.

WITNESS: Witness did as requested.

TC: Okay. Now . . . , like I told you the last time, when you're in the presence of adults and you raise your right hand, that means you have to tell the truth. Okay?

WITNESS: No response.

MJ: . . . [said the child's name]?

TC: . . . [said the child's name]?

WITNESS: Witness nodded her head in the affirmative and muttered "yes."

TC: You're going to have to speak up now.

MJ: Just a minute . . . . , sit down. That a girl.

TC: Okay. Now . . . , it's not raining—if I said it was raining, would I be telling the truth?

WITNESS: No response.

TC: It's not raining in here, is it?

WITNESS: Witness shook her head "No."

TC: Okay. Now do you promise us to tell the truth today?

WITNESS: Witness nodded her head in the affirmative.

TC: And when little girls tell lies, is that bad?

WITNESS: Witness nodded her head in the affirmative.

TC: And do little girls get punished when they tell lies?

WITNESS: Witness nodded her head in the affirmative.

TC: And you promise us to tell the truth today?

WITNESS: Witness nodded her head in the affirmative.

Mil.R.Evid. 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules." Further, the rules of evidence state:

> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by *oath or affirmation administered in a form calculated to awake the witness's conscience and impress the witness's mind with the duty to do so.*

Mil.R.Evid. 603 (emphasis added).

The trend in Federal civilian courts [7] and military justice is to let "all witnesses . . . testify," in order "to provide court-members with the greatest amount of arguably reliable evidence possible, with the expectation that court-members can decide the appropriate weight to be given imperfect witness." S. Saltzburg, L. Schinasi, and D. Schluter, *Military Rules of Evidence Manual* 492 (2d ed. 1986). Mil.R.Evid. 603 "is written to permit atheists, conscientious objectors, *children* and individuals with emotional difficulties to satisfy the basic criterion" of affirming their duty to tell the truth. *Id.* at 498 (emphasis added).

We have never suggested that children might be incompetent to testify based on some general inability to understand an oath or affirmation to tell the truth.[8] Certainly there is nothing in this record to cause us to reverse this course with respect to child witnesses in sexual-abuse cases. *See* J. Myers, *Child Witness Law and Practice* §§ 3.17-3.19 at 93-99 (1987).

The colloquy between the child, trial counsel, and the military judge more than sufficiently demonstrates that

---

[7] *See United States v. Lightly*, 677 F.2d 1027, 1028 (4th Cir. 1982) (witness competent to testify, even though found criminally insane and suffering from hallucinations, when psychiatrist established witness "had a sufficient memory" and "understood" obligation to tell the truth).

[8] *See United States v. LeMere*, 16 MJ 682, 685-86 (ACMR 1983), where the United States Army Court of Military Review found that a 3-year-old witness demonstrated the capacity to testify to what she understood to be the truth; any subsequent confusion by the child as to truth and fantasy went to the weight of

the witness knew the difference between truth and falsity, and that she intended to tell the truth. Appellant's complaint that her affirmative responses were predominantly nods of the head rather than verbal responses is without merit, where the court reporter meticulously documented the gestures.[2] It does not strike us as surprising that a 4-year-old might experience hesitancy and apprehension at the prospect of speaking before a room full of adults, including her assailant. It was a matter for the members, who heard and observed her, to decide what weight would be given to her testimony. As for the propriety of her testifying, the military judge correctly determined that she was competent.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge EVERETT and Judge SULLIVAN concur.

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[2] Witnesses of all ages sometimes respond by nodding or shaking the head. As long as the court reporter accurately reflects the gesture in the record, the record is adequate, even though it would be better if witnesses would always respond verbally. In the case of young children, even more tolerance may be necessary. This should not be surprising or unduly burdensome.

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

Before EDWARD M. BYRNE, E. M. ALBERTSON, R. A. JONES.

UNITED STATES

v.

ARTHUR L. MORGAN, 542 11 7182
Corporal (E-4), U.S. Marine Corps

NMCM 88 3838 Decided 26 July 1989

Sentence adjudged 11 March 1988. Military Judge: M. L. Haiman. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), FMF, Camp Pendleton, CA 92055-5500.

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LT ROBERT A. KEMINS, JAGC, USNR, Appellate Government Counsel
LT RICK D. BASTIEN, JAGC, USNR, Appellate Government Counsel
HOWARD J. DE NIKE, ESQUIRE, Civilian Defense Counsel

PER CURIAM:

Appellant was convicted, contrary to his pleas, of violating the Uniform Code of Military Justice, Articles 125

and 134. After having been convicted of forcible sodomy with a four-year-old girl and of wrongfully communicating indecent language to that same child, appellant was sentenced to confinement for ten years, forfeiture of all pay and allowances, reduction to pay grade E-1, and to a dishonorable discharge.

Appellant asserts first, that the military judge erred in admitting, over defense objection, and permitting the members to view, a videotape recording of an interview by a social worker with the four-year-old victim, and that second, the competency of the four-year-old victim was not legally established at trial. We find no merit to either claim of error.

Facts

Appellant's family and the victim and her mother were close friends and neighbors. On the evening of 1 October 1987, after appellant's wife had left for work, L, the four-year-old victim and her mother, shared a pizza dinner with appellant and his three daughters at appellant's home. At 2000, appellant put his children to bed while L's mother was using the telephone to call her own mother in Virginia. According to L, during the course of this forty-minute phone call by her mother, appellant led her to his bedroom, removed her pants, and anally sodomized her. He told her not to scream, and then asked her to lick his penis. She refused, and he released her.

A short while later, after returning home, L told her mother what had happened. L's mother took her to a hospital, and the doctors who examined L noted recent damage to her anal tissue which was consistent with non-accidental, forced entry into her anus by a large, blunt object. Later the next day, L was interviewed, on videotape, by Ms. Davis, a social worker from the Center for Child Protection. During this interview L described, using anatomically correct dolls, how appellant "had stuck his knobby in my butt."

At the conclusion of the Government's case, the trial counsel sought to admit, pursuant to Military Rule of Evidence (Mil.R.Evid.) 801(d)(1)(B), the videotape of the interview between L and Ms. Davis. The trial counsel argued that this interview was a prior consistent statement, admissible to rebut the inferences drawn by the defense counsel during cross-examination of both L and her mother, suggesting that L's trial testimony incriminating appellant was fabricated or the product of undue influence upon L by her mother. Appellant now argues that even if the videotape of the interview qualifies as a prior consistent statement under Mil.R.Evid. 801(d)(1)(B), its probative value was substantially outweighed by its danger for creating unfair prejudice, and should have been excluded by the military judge because of Mil.R.Evid. 403.

Discussion

A.

Mil.R.Evid. 801(d)(1)(B) provides, in part:

> (d) *Statements which are not hearsay.* A statement is not hearsay if:
>
> > (1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

We find that the videotape was properly admitted as evidence at trial. *Cf., United States v. LeMere*, 21 M.J. 61 (C.M.A. 1986). L's testimony at trial was consistent with the statements she made to Ms. Davis in her videotaped interview. Appellant's trial defense counsel, during cross-examination of both L and her mother, sought to establish that L's testimony incriminating appellant

was the product of the mother's improper influence. This undue influence, trial defense counsel suggested, stemmed from L's mother's desire for her husband to return from deployment, her interest in having her own mother visit and stay with her through the end of her pregnancy, and receive her mother's assistance in moderating L's recent displays of inappropriate behavior. The defense counsel explicitly argued at trial that L's "story" was not true, but instead was a product of her mother's coaching and the mother's desire to create a family crisis so that she would receive the assistance she needed from her husband and mother. The videotape interview in which L explains what happened to her the evening she was anally sodomized is an admissible prior statement under Mil.R.Evid. 801(d)(1)(B), given that L testified at trial, was subject to cross-examination, her testimony was consistent with what she said during the interview, and the inferences raised by trial defense counsel during cross-examination of the Government witnesses. We disagree that this videotape interview ran afoul of Mil.R.Evid. 403, as we cannot find, nor has the appellant pointed out to us, how the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. This videotaped evidence is indeed damaging to appellant, but its admission created no unfair prejudice to the appellant, who had the opportunity to cross-examine L at trial, and who did indeed seek to establish other explanations behind these allegations. L testified as a witness and the court members could observe her demeanor and evaluate her credibility, memory, and ability to narrate the events accurately. Under these circumstances, the introduction of L's extrajudicial statement passes both evidentiary and constitutional muster. *See LeMere*, 22 M.J. at 69.

B.

Appellant challenges four-year-old L's competency to testify, pointing out that no proper oath was ever taken by her, and that during the initial portion of her testi-

mony, many questions posed to her were not answered at all or answered in a non-verbal fashion by nodding her head.

Military Rule of Evidence 601 states, "[e]very person is competent to be a witness except as otherwise provided in these rules." This means, barring application of a privilege or an unwillingness by the witness to swear or affirm to be truthful, everyone is considered competent to testify. No categorical disability for youth exists in the Military Rules of Evidence. However, "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so." Mil.R.Evid. 603.

At trial, the trial counsel asked L if she understood why she was here, whether she promised to speak the truth, and whether it was bad to tell lies. L responded by nodding her head in the affirmative. L, after a brief recess, testified clearly and fully about what happened to her that night, and was subjected to cross-examination. No objections as to the form of the oath given to L or to her competency were made during trial by the defense counsel. We view her earlier communication problems in responding verbally to questions posed by trial counsel as the product of extreme nervousness, and in viewing the relevant portions of the record as a whole, find her testimony to be clear and cogent. We see no indication in the record that she was not competent to be a witness. *See LeMere*, 22 M.J. at 66; *United States v. Urbina*, 14 M.J. 962 (ACMR 1982); *United States v. Allen*, 13 M.J. 597 (AFCMR 1982).

We have examined the record of trial, the petition for clemency, the assignments of error and the Government's reply thereto and we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appel-

lant was committed. Accordingly, the findings and sentence, as approved on review below, are affirmed.

EDWARD M. BYRNE, Chief Judge

E. M. ALBERTSON, Judge

R. A. JONES, Judge

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(2)

No. 90-888

In the Supreme Court of the United States

OCTOBER TERM, 1990

ARTHUR L. MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court properly admitted under Mil. R. Evid. 801(d)(1)(B) a prior consistent statement made by the victim after petitioner alleged that the victim's trial testimony was a recent fabrication.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

United States v. *Anderson*, 782 F.2d 908 (11th Cir. 1986) 4

United States v. *Bowman*, 798 F.2d 333 (8th Cir. 1986), cert. denied, 479 U.S. 1043 (1987) 5

United States v. *Brennan*, 798 F.2d 581 (2d Cir. 1986), cert. denied, 109 S. Ct. 1750 (1989) 5

United States v. *Hamilton*, 689 F.2d 1262 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983) 4

United States v. *Henderson*, 717 F.2d 135 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984) 5

United States v. *McCaskey*, 30 M.J. 188 (C.M.A. 1990) 4

United States v. *Monzon*, 869 F.2d 338 (7th Cir.), cert. denied, 109 S. Ct. 2087 (1989) 5

United States v. *Parry*, 649 F.2d 292 (5th Cir. 1981) 4

United States v. *Rios*, 611 F.2d 1335 (10th Cir. 1979) 4

United States v. *Scholle*, 553 F.2d 1109 (8th Cir.), cert. denied, 434 U.S. 940 (1977) 5

United States v. *Smith*, 893 F.2d 1573 (9th Cir. 1990) 5

United States v. *Vest*, 842 F.2d 1319 (1st Cir.), cert. denied, 488 U.S. 965 (1988) 5

Statutes and rule—Continued: Page

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 32, 10 U.S.C. 832 ..... 2, 3, 4, 5
Art. 38, 10 U.S.C. 838 2
Art. 125, 10 U.S.C. 925 2
Art. 134, 10 U.S.C. 934 2
Mil. R. Evid.:
Rule 801(d)(1) 3
Rule 801(d)(1)(B) 3, 4, 5
Rules for Courts-Martial:
Rule 405(f) 3
Rule 405(g) 3

Miscellaneous:

Manual for Courts-Martial, United States—1984 3

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-10a) is reported at 31 M.J. 43. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 11a-16a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 7, 1990. The petition for a writ of certiorari was filed on December 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial of forcible sodomy

upon a child and wrongfully communicating indecent language to that child, in violation of Articles 125 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925 and 934. The court-martial sentenced petitioner to 10 years' confinement, a dishonorable discharge, total forfeiture of pay, and a reduction in rank. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed. The Court of Military Appeals granted discretionary review and affirmed.

1. On October 1, 1987, petitioner invited the victim's mother and the victim, a four-year-old girl, to his home for dinner. Tr. 89. During the evening, while petitioner was alone with the victim, he anally sodomized her. Tr. 189, 191-195. Later that evening, the victim reported the incident to her mother. Tr. 104, 194-195. The mother examined the child's anus and saw an irritation and blood. Tr. 105-106. The mother took her daughter to a hospital, where the attending physician confirmed that the victim's anal area had been significantly damaged. Tr. 108, 214-216; GXs 2, 6, and 7. A videotaped interview between the child and a social worker was conducted in which the child, with the aid of anatomical dolls, described petitioner's conduct. Tr. 286-300. The child subsequently testified about the events at an Article 32 hearing. Tr. 282.[1]

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[1] Article 32, UCMJ, 10 U.S.C. 832, provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charges. An Article 32 hearing is similar to a preliminary hearing conducted before trial in civilian criminal justice systems. The defendant has the right to be informed of the charges against him, to be present at the hearing, to be represented by counsel (and to have counsel appointed for him), to be informed of the identity of the witnesses that the prosecution expects to call, as well as the identity of his accuser, to cross-examine all available witnesses, and to present evidence in his own defense or

2. Petitioner's strategy at trial was to contend that the child's allegations were false, the result of improper influence exerted on the child by her mother, who persuaded or forced her daughter to manufacture the allegations in order to help ensure that the mother's husband, who was deployed overseas, would be returned home early. Tr. 83-84. Petitioner also asserted that the child's testimony had been "coached" by being "repeated over and over," and that her trial testimony was inconsistent with her earlier testimony at the Article 32 hearing. Tr. 122, 196-199, 471-473.

Defense counsel announced his strategy during his opening statement. Tr. 83-84. He used cross-examination of the victim and the mother to advance his theory, and he stressed that theory in his closing argument as the basis for acquitting petitioner. Tr. 122, 132-134, 137, 471-473. To rebut petitioner's contentions, the prosecutor offered the videotaped interview of the victim as a prior consistent statement under Mil. R. Evid. 801(d)(1)(B).[2] Tr. 277. Petitioner objected to the videotape at trial, although his objection was vague and unfocused. Tr. 281-282. He now objects to the use of the videotape on the ground that it would not rebut the alleged motive to fabricate because the motive to fabricate on the part of the mother existed prior to the initial complaint and the videotaped interview.

The trial court overruled the objection, holding that Mil. R. Evid. 801(d)(1)(B) had no "timing parameters" and that the nature of the cross-examinations of the victim and mother made the videotape admissible as a prior con-

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in mitigation of the severity of the charges. Art. 38, UCMJ, 10 U.S.C. 838; Rule for Court-Martial 405(f) and (g), *Manual for Courts-Martial, United States* – 1994 (*Manual*).

[2] Rule 801(d)(1)(B) of the Military Rules of Evidence was taken without change from the Federal Rules. Analysis, Military Rule of Evidence 801(d)(1), *Manual*.

sistent statement. Tr. 284-285. The videotaped interview was played for the court-martial members. Tr. 286.

3. The court of military review affirmed. Pet. App. 11a-16a. It held that the videotape was admissible under Mil. R. Evid. 801(d)(1)(B) because all of the requirements of the Rule were satisfied. Pet. App. 13a-16a.

4. The Court of Military Appeals affirmed. Pet. App. 1a-10a. In an earlier decision, *United States* v. *McCaskey*, 30 M.J. 188 (C.M.A. 1990), the court had held that a statement is admissible under Mil. R. Evid. 801(d)(1)(B) only if the statement was made prior to the time when the alleged recent fabrication or improper influence occurred. Relying on *McCaskey*, the Court of Military Appeals in this case held that the victim's statement was properly admitted because she uttered the statement before the Article 32 hearing, and the defense claimed that the witness had fabricated her testimony after that hearing. Pet. App. 7a.

ARGUMENT

Petitioner maintains that a statement must be made prior to the time when the alleged recent fabrication or improper influence occurred in order for that statement to be admissible under Mil. R. Evid. 801(d)(1)(B). Petitioner also contends that there is a conflict among the circuits on that question. Pet. 5.

Petitioner is correct that there is disagreement among the circuits on the "timing" issue,[3] but this case is not an ap-

[3] The Fifth, Sixth, Tenth, and Eleventh Circuits have held that a statement can be admitted under Fed. R. Evid. 801(d)(1)(B) even if the statement is made after the alleged recent fabrication or improper influence occurred. *United States* v. *Parry*, 649 F.2d 292, 296 (5th Cir. 1981); *United States* v. *Hamilton*, 689 F.2d 1262, 1273-1274 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983); *United States* v. *Rios*, 611 F.2d 1335, 1349 (10th Cir. 1979); *United States* v. *Anderson*, 782 F.2d 908, 915-916 (11th Cir. 1986). The First, Second, Fourth, Seventh, and Ninth

propriate vehicle for resolving that disagreement. The Court of Military Appeals adopted the rule that petitioner has urged in this Court. In both this case and *McCaskey*, the Court of Military Appeals held that a statement is admissible under Mil. R. Evid. 801(d)(1)(B) only if the statement was made before the time when the alleged recent fabrication or improper influence occurred. Accordingly, petitioner's disagreement with the Court of Military Appeals amounts to nothing more than the argument that that court misapplied the correct standard to the facts of this case. That fact-bound claim does not warrant review by this Court.

In any event, the Court of Military Appeals correctly found that the victim made the videotaped statement well in advance of the time that, under the defense theory, the victim's mother began to "coach" her daughter about what testimony to give at trial. The victim made the videotaped statement shortly after being examined at the hospital on the evening of the assault, which occurred long before either the Article 32 hearing or the trial. Under these circumstances, the court below correctly held that the victim made the statement before the alleged "coaching" incidents

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Circuit decisions cited by petitioner have adopted the contrary rule, albeit in dicta. *United States* v. *Vest*, 842 F.2d 1319, 1329-1330 (1st Cir.), cert. denied, 488 U.S. 965 (1988); *United States* v. *Brennan*, 798 F.2d 581, 587 (2d Cir. 1986), cert. denied, 109 S. Ct. 1750 (1989); *United States* v. *Henderson*, 717 F.2d 135, 138 (4th Cir. 1983), cert. denied, 465 U.S. 1009 (1984); *United States* v. *Monzon*, 869 F.2d 338, 343 (7th Cir.), cert. denied, 109 S. Ct. 2087 (1989); *United States* v. *Smith*, 893 F.2d 1573, 1581 (9th Cir. 1990). Eighth Circuit decisions on this question point in both directions. Compare *United States* v. *Scholle*, 553 F.2d 1109, 1122 (8th Cir.), cert. denied, 434 U.S. 940 (1977) (statement need not be made before alleged recent fabrication or improper influence occurred), with *United States* v. *Bowman*, 798 F.2d 333, 338 (8th Cir. 1986), cert. denied, 479 U.S. 1043 (1987) (statement must be made before alleged recent fabrication or improper influence occurred).

were claimed to have occurred. Because the decision below is correct and because the court applied the legal theory that petitioner urges this Court to adopt, the judgment below does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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